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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5261

ALASKA HELICOPTERS, INC., *Petitioner*.

v.

LESTER M. ANDERSON, *Respondent*

GENERAL ELECTIC COMPANY, *Petitioner*

v.

STATE OF ALASKA,
MILLICENT JENNINGS
As Administratrix Of The Estates Of
STEVE GANUELAS AND VICTORIA A. VELASCO,
TED OREIRO, ARTURO QUEBRAL, SIMEON TINAGEN
AND NAKAT PACKING COMPANY, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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No.

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STATE OF ALASKA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

Petitioners, Alaska Helicopters, Inc. and General Electric Company, respectfully request that a writ of certiorari issue to review the two orders of the Alaska Supreme Court dated June 28, 1973 (App. A and C) —final decrees with respect to the question involved.

OPINIONS BELOW

The relevant opinions are all unreported, and are attached as appendices as follows:

APPENDIX A—Supreme Court, Order, dated June 28, 1973, in *Alaska Helicopters, Inc.* v. *Anderson.*

APPENDIX B—Superior Court, Order Granting Reinstatement of Cause, dated August 17, 1972, in *Anderson* v. *Atlantic Richfield Co. and Alaska Helicopters, Inc.*

APPENDIX C—Supreme Court, Order, dated June 28, 1973, in *State of Alaska and General Electric Co.* v. *Jennings.*

APPENDIX D—Superior Court, Order, dated October 6, 1972, in *Jennings* v. *State of Alaska and General Electric Company.*

APPENDIX E—Superior Court, Order Denying Motion to Vacate Order Denying Motion to Set Aside Judgment of Dismissal, dated August 31, 1972, in *Schandelmeier* v. *Winchester Western,* a companion case.

JURISDICTION

These orders of the Alaska Supreme Court were entered June 28, 1973, and this petition has been filed within ninety days of that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), involving a final decree rendered by the highest court of the State of Alaska. The decree is final in accord with *Rosenblatt* v. *American Cyanamid Co.,* 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965); *Local Union No. 721, United Packinghouse, Food and Allied Workers, AFL-CIO* v. *Needham Packing Co.,*

376 U.S. 247, 11 L. Ed. 2d 680, 84 S. Ct. 773 (1964); *Local No. 438, Construction and General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 9 L. Ed. 514, 83 S. Ct. 531 (1963); and *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 9 L. Ed. 2d 523, 83 S. Ct. 520 (1963).

QUESTION PRESENTED

Whether plaintiffs' cases which had been dismissed for a year or more may be reopened by state courts under a rule identical to Federal Rule of Civil Procedure 60(b)(6), solely for the reason that the dismissals took place because of unexcused misconduct and omissions of the plaintiffs' attorney in continued failure to comply with discovery orders, and that failure to reopen would injure the client, or

Whether the holding of *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386, reh. den. 371 U.S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115 (1962), precludes this reopening and binds clients to the results visited upon them for their attorney's misconduct.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The motions to reopen these cases were granted under the general provision of Alaska Rule of Civil Procedure 60(b)(6), identical to Federal Rule of Civil Procedure 60(b)(6), and attached as Appendix F.

The action of the Alaskan courts was contrary to "our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent." (*Link* v. *Wabash Railroad Company*, 370 U.S. 626, 633, 8 L. Ed. 2d 734, 740 (1962).) The basic precepts of our system constitute due process in

accord with Amendment XIV, Section 1, to the Constitution of the United States.

The result of the action of the Alaskan Court in protecting the client from the effects of his attorney's misconduct and in failing to protect the adverse party from this same conduct constitutes a denial of equal protection in accord with Amendment XIV, Section 1, to the Constitution of the United States.

STATEMENT OF THE CASE

These decisions are two allowing the reinstatement of cases dismissed because of the errors and omissions of the same attorney, Mr. Thomas Curran. Reinstatement was refused upon similar facts in a third, *Schandelmeier* v. *Winchester Western*, and this case is presently under advisement in the Alaska Supreme Court awaiting decision after appeal.

In the first case, Lester Anderson filed suit on October 9, 1969, for personal injuries sustained in a helicopter accident on the North Slope of Alaska. Because of a consistent pattern of thwarting discovery during the course of the lawsuit by failure to answer interrogatories, even in the face of an order compelling answers, and failure to submit to deposition, Alaska Helicopters moved for dismissal of the case on April 14, 1971.

On June 29, 1971, the Superior Court, after hearing, conditionally granted Alaska Helicopter's motion to dismiss and ordered that the action be dismissed unless, among other things, Anderson appeared for his deposition on or before July 9, 1971, and unless before that date Anderson answered interrogatories served on him dated March 5, 1971, and March 24,

1971. Anderson appeared for his deposition on July 8, 1971, but did not file or serve answers to the interrogatories. Accordingly, on July 12, 1971, the Court entered a judgment of dismissal. A copy of this judgment of dismissal was sent to Anderson's attorney by Alaska Helicopters on July 12, 1971, and also sent by the Court on July 13, 1971. On August 9, 1971, after the case had been dismissed, Anderson answered the interrogatories dated March 5, 1971. In November, 1971, Anderson purported to answer the interrogatories propounded to him on March 24, 1971. However, these answers were not signed by Anderson, but were instead signed by his attorney pursuant to an unwitnessed and unnotarized power of attorney which was attached.

On August 26, 1971, Anderson, through his original attorney, filed a motion to set aside the judgment of dismissal and reinstate the case. This motion was denied on September 10, 1971. Anderson's attorney then renoticed the motion on September 19, 1971. This motion was heard on October 15, 1971, and the Court refused to vacate the judgment for a second time. On July 11, 1972, one day short of a year from the date that the case was dismissed, Anderson, through new attorneys, filed still a third motion to reinstate, supported by affidavits and memoranda alleging misconduct of Anderson's original attorney.

The motion was first considered by Judge James M. Fitzgerald who indicated that he would not reinstate the case, but that he referred it to Judge C. J. Occhipinti as the assigned judge for a final decision. Judge Fitzgerald stated:

> "The thing that I can't escape observing at this time, is that I fail to see how under these cir-

> cumstances discovery could be pos—could possibly be effective if interrogatories served long ago as those were not answered time after time when it was called—the attention was called by the court to the fact of the failure to answer. Now, I don't know who the fault is, but it'd be difficult for me to set aside the default under any circumstances and realizing of course that the client may well be deprived as you say on the hearing on the merits of his case, but I don't know what the upshot's going to be because it should go back to Judge Occhipinti. . . ." (Transcript B-572, pg. 2, lines 10-21.)

On August 17, 1972, Judge C. J. Occhipinti reinstated this case solely for the reason of possible attorney misconduct, stating in his order:

> "After a thorough review of the file, it appears that plaintiff may not have been advised of all that transpired in this case or counseled on all that was necessary. To deny his motion would be manifest injustice." (App. B.)

In the second case, Millicent Jennings, secretary to Mr. Curran, filed suit on July 10, 1970, mere days before the statute of limitations ran, as administratrix of the estates of Ganuelas and Velasco, for their deaths caused by a fire at the Nakat Packing Co. cannery at Waterfall, Alaska, on July 13, 1968. Claims for personal injuries to other plaintiffs were joined in the same suit with the wrongful death claims, and Nakat asserted a claim for damage to the cannery. Recovery was sought from General Electric allegedly because the fire was caused by a short-circuit in a General Electric motor, and from the State of Alaska because the State allegedly breached its duty to enforce its fire code.

The first set of interrogatories was served by General Electric on August 18, 1970. A motion to compel answers had to be made on November 6, 1970, and an order compelling answers was entered by the Superior Court on December 8, 1970. In December, 1970, General Electric served additional interrogatories, and filed a motion to produce. On December 29, 1970, General Electric moved for sanctions for plaintiffs' failure to obey the order of December 8, 1970. On January 18, 1971, the order requiring production was entered, and on January 22, 1971, another order compelling answers was entered. General Electric Company made another motion to dismiss on February 3, 1971, because no discovery was yet forthcoming from plaintiffs. At plaintiffs' request, this matter was continued to allow the interrogatories to be answered. The interrogatories were not answered. The State of Alaska had also propounded a set of interrogatories on February 18, 1971, which were unanswered and filed a motion for production on March 19, 1971. The State's motion for production and for an order compelling plaintiffs to answer its interrogatories were heard together with General Electric Company's motion to dismiss on April 23, 1971. At this time, discovery was still not forthcoming. After this hearing, on April 28, 1971, the Court entered an order dismissing all actions on behalf of all plaintiffs, except providing that the actions could be reinstated within sixty days if the discovery work were brought up to date. The work was not done and a confirmation judgment of dismissal with prejudice was entered on August 30, 1971.

Plaintiffs moved to reinstate the case as to plaintiffs, Nakat Packing Company, Millicent Jennings as

Administratrix of the Estate of Victoria A. Velasco, Ted Oreiro, Arturo Quebral and Simeon Tinagen, only, by means of a motion to reinstate filed October 27, 1971, and some interrogatory answers were filed on November 2, 1971. The State of Alaska, joined by General Electric Company, filed a motion to strike the motion to reinstate on the grounds that plaintiffs had not complied with the requirements of Alaska Rule of Civil Procedure 60(b). The motion to strike was granted on January 10, 1972.

On August 28, 1972, plaintiffs, through original and affiliated counsel, again filed a motion for relief from judgment, and requested a reinstatement of the case. This motion was filed one year and four months after the original dismissal, and was granted by order dated October 6, 1972. Judge Edward V. Davis, in reopening the case, specifically found inexcusable neglect on the part of Mr. Curran, but would not impute that neglect to the client. He specifically stated:

> "Gentlemen, my inclination here is to deny this motion out of hand. I would do so without further ado except for the fact that we are not dealing here with Mr. Curran we're dealing with people who may have a perfectly good claim and who probably without fault on their part have not had that claim presented in Court. I'm going to start with the idea that Mr. Curran is not solely at fault in this case. I'm going to start with the idea that his corresponding attorneys have been guilty of substantial neglect here and helped complicate his problem. That doesn't change the fact that Mr. Curran certainly could have and certainly should have done something about this long, long, long before he did. . . . Now what happened between January 10th and August 28th I don't know. Certainly it would appear that something

> should have been done and wasn't done. Mr. Curran, I am not excusing you at all for what you didn't do. I am considering that you have some clients here who are entitled to better representation than they got, either from you or the other attorneys or maybe a combination of both. With that in mind, I'm going to go against my own inclination here and I'm going to grant your motion for relief from judgment. . . ." (Transcript of Hearing, pg. 31 beginning at line 24.)

In the third case, *Schandelmeier* v. *Winchester Western,* discovery was thwarted by continued failure of the Schandelmeiers to present themselves for deposition, contrary to notices sent and specific agreements with Mr. Curran during 1971 and early 1972. A judgment of dismissal was signed on March 29, 1972. Contrary to the two previous cases, Judge James K. Singleton twice refused to vacate the judgment of dismissal by orders dated July 13, 1972, and August 31, 1972. (App. E.)

The Schandelmeier decision (App. E) was appealed from as a final order, and the Alaska Supreme Court discretionarily granted review of the other two orders granting reinstatement. (App. B and D.) After full briefing and consolidated oral argument of all three cases, the Alaska Supreme Court entered orders denying petitioner's request for reversal on the merits in the *Alaska Helicopters* and *General Electric* cases. (App. A and C.) The appeal in *Schandelmeier* remains pending decision in the Alaska Supreme Court.

The decision of all courts was made with full knowledge of the holding and rationale of *Link* v. *Wabash Railroad Company,* 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386, reh. den. 371 U.S. 873, 9 L.

Ed. 2d 112, 83 S. Ct. 115 (1962), which was called to the attention of all judges and courts at all stages of the proceeding.

REASONS FOR GRANTING THE WRIT

I. These Orders of the Supreme Court of Alaska Are Final Decrees.

The orders of the Alaska Supreme Court are final on the question of the propriety of reopening cases dismissed for attorney misconduct solely because failure to reopen would be detrimental to the client, and constitute precedent which will be applied in future Alaskan cases of this type. This policy determination is anterior to and separable from the merits of the cases themselves. Most important, however, is the fact that these orders present a serious erosion of a national policy—that of preserving the binding effect of attorneys' actions in our federal and state systems of representative litigation. Unless clients are bound by their attorney's actions, the judicial system cannot function. Accordingly, the orders are final under the rationale of *Rosenblatt* v. *American Cyanamid Co.*, 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965); *Local Union No. 721, United Packinghouse, Food and Allied Workers, AFL-CIO* v. *Needham Packing Co.*, 376 U.S. 247, 11 L. Ed. 2d 680, 84 S. Ct. 773 (1964); *Local No. 438, Construction and General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531 (1963); and *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 9 L. Ed. 2d 523, 83 S. Ct. 520 (1963).

II. The Time Is Proper in the Development of the Alaskan Judicial System That This Policy Be Reviewed.

The attitude of the Alaskan judicial system towards blatant rule violations has historically and to the present date been unbelievably lenient, and sanctions almost non-existent. As stated by Judge Singleton when hearing *Schandelmeier:*

> "I, for one, during my trial days have obtained against certain counsel whose names will not be repeated at this time, more than 10 orders from a court to do something and each time there has been a complete default, and each time the default was excused for no reason at all, simply because anything else might interfere with the presentation of the merits of the case, failing to realize that the merits of the case requires some kind of cooperation between both sides so that all the evidence can be developed and presented."

The undersigned has experienced this attitude in his own practice, and several times grave prejudice to his client has resulted.

This policy is ripe for review now because the *Alaska Helicopters* and *General Electric* cases represent the most radical holdings against diligent litigants yet experienced—the reopening of cases dismissed for one year and one year and four months. Additionally, they represent the leaders in what promises to be a parade of these cases. *Schandelmeier* is the third. The undersigned defeated a lower court motion to reopen a fourth, which decision was not appealed. Numerous other cases exist which are dismissed for the same failures, and in which a motion to reopen may well be forthcoming. The extent of the problem in the United States District Court is set forth in the memorandum of Judge Raymond E.

Plummer (App. G) which lists 18 cases involving Mr. Curran alone. The problem is as great in state courts, but a listing has never been compiled.

When the standard of enforcement of court orders and decisions has reached the nadir represented by *Alaska Helicopters* and *General Electric,* it is time that the situation be reviewed. This is especially true since the decisions of the various lower court judges are in conflict, and a number of the decisions appear to be made reluctantly.

III. The Orders of the Alaskan Supreme Court Are Directly Contrary to the Basic Precepts of the Anglo-American Legal System, as These Precepts Are Set Forth in Link v. Wabash Railroad Company, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S.Ct. 1386, reh. den. 371 U.S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115 (1962).

The *Link* case states that it is basic to our system of representative litigation that each party is deemed bound by the acts of his attorney. The Alaskan decisions are directly contrary because they do not bind the client to the acts of the attorney, but permit the client to disavow the attorney when an unfavorable result is reached. The *General Electric* decision goes further and even permits the attorney to disavow his own acts, because not to do so might injure his client.

IV. Extreme Inherent and Actual Prejudice Has Been Worked on Petitioners and Will be Worked on Numerous Diligent Future Litigants If These Orders Are Not Reversed.

As was recognized in footnote 10 of *Link,* the reopening of these cases is a direct infliction of the results of the sins of plaintiff's attorney upon defendant. In both cases, discovery has become very stale. The independent witnesses to the Anderson accident have left Alaska. The whereabouts of the General

Electric motor is uncertain. Alaska Helicopters probably has lost an indemnity claim against the helicopter manufacturer because the statute of limitations has run.

Most important, however, is the reliance factor built into our judicial system. Reliance is placed on the proposition that judgments are final, subject to the possible relief in Civil Rule 60. This reliance in the finality of judgments of dismissal is no longer available in Alaska, and apparently a defendant is now expected to continue with discovery and trial preparation even after a case has been dismissed. It is obviously unworkable that judgments in Alaska can be reopened solely for attorney misconduct, for our basic system requires that attorneys be able to rely on the authority of the acts of their adversaries.

There are two groups that need protection in situations such as this—the clients and the adverse parties. Protection to the client is available through disbarment or civil malpractice actions, or by simply being more selective in the hiring of an attorney. Protection to the adverse parties is available only through judicial sanctions in each individual case, however. At present in Alaska, as exemplified by these cases, these protections are not available to the adverse parties and all protections go to the client.

A continuation and future strengthening of this imbalance of protections is dreaded, and it is mainly for this reason that a petition for certiorari is sought.

CONCLUSION

The *Link* decision specifically states that clients are bound by the acts of their attorneys, and the Alaskan decisions are contrary. Exactly the same issue has now

been raised in a Rule 60(b)(6) motion, which avenue was specifically left undecided by Link, but which would be presumably foreclosed by *Link's* rationale. Either *Link* means what it says and these orders should be reversed, or Rule 60(b) is available and *Link* must be clarified.

Accordingly, a writ of certiorari should issue to review the orders of the Supreme Court of Alaska, and these orders should be reversed.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 1805

ALASKA HELICOPTERS, INC., *Petitioner,*

v.

LESTER M. ANDERSON, *Respondent.*

Order

It is ORDERED:

1. The Petition for Review is denied.

2. The superior court may consider this case further to determine whether, pursuant to Rule 95, Rules of Civil Procedure, costs and attorney's fees should be imposed upon the counsel who acted for respondent in the superior court.

3. The superior court may also consider whether the conduct of counsel for the respondent in the superior court was such as to warrant referral of the matter to the Alaska Bar Asociation for appropriate investigation and disciplinary action.

BY DIRECTION OF THE COURT.

DATED this 28th day of June, 1973.

/s/ JOSEPHINE M. MCPHETRES
Josephine M. McPhetres
Clerk

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 70-2395

LESTER M. ANDERSON, *Plaintiff*,

vs.

ATLANTIC RICHFIELD COMPANY,
AND ALASKA HELICOPTERS, INC., *Defendants*.

Order Granting Reinstatement of Cause

The history of this case has been heard at previous hearings, but for the sake of brevity the matter here was dismissed on July 12, 1971.

On September 10, 1971, the plaintiff moved to reinstate, which the Court denied. A rehearing was moved and heard on October 15, 1971, at which time the Court advised the plaintiff reinstatement would not be considered unless certain answers to interrogatories were first filed. Some time in November, 1971, certain certain answers were filed, but no further action was noted until July 11, 1972 when plaintiff again moved for reinstatement, this time being represented by Floyd Smith.

A hearing was scheduled and heard on August 8, 1972. Mr. Curran, who had previously represented the plaintiff, advised he would be out of town that date and requested a continuance. Since the matter had been previously scheduled at least once, and continued, the Court denied the continuance, allowed argument, but gave Mr. Curran until August 11, 1972 at noon to file or submit anything he wished considered. Nothing was filed or submitted.

After a thorough review of the file, it appears that plaintiff may not have been advised of all that transpired in the case, or counseled on all that was necessary. To deny his motion would be manifest injustice.

Defendant, however, is entitled to reasonable compensation for the delay caused by Mr. Curran is not conforming to orders issued by this Court. Accordingly, defendant's attorney is advised to set a hearing with reasonable notice to Mr. Curran so that the Court may determine how much of the amount posted in the form of a bond shall be awarded to defendant for costs and attorney's fees caused by the delay involved.

DATED at Anchorage, Alaska this 17th day of August, 1972.

/s/ C. J. OCCHIPINTI
C. J. Occhipinti
Superior Court Judge

APPENDIX C

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 1819

STATE OF ALASKA, *et al, Petitioners,*

v.

MILLICENT JENNINGS,
As Administratrix Of The Estate Of
STEVE GANUELAS AND VICTORIA A. VELASCO,
et al, Respondents.

IT IS ORDERED:

1. The Petition for Review is denied.

2. The superior court may consider this case further to determine whether, pursuant to Rule 95, Rules of Civil Procedure, costs and attorney's fees should be imposed upon the counsel who acted for respondent in the superior court.

3. The superior court may also consider whether the conduct of counsel for the respondent in the superior court was such as to warrant referral of the matter to the Alaska Bar Association for appropriate investigation and disciplinary action.

By Direction Of The Court.

Dated this 28th day of June, 1973.

/s/ Josephine M. McPhetres
Josephine M. McPhetres
Clerk

APPENDIX D

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 70-1966 A

Millicent Jennnings, *etc., et al., Plaintiffs,*

v.

State Of Alaska and
General Electric Company, *Defendants*

Order

This case came on to be heard on the plaintiffs' motion for relief from final judgment on September 21, 1972. After due consideration,

It Is Hereby Ordered that plaintiffs' motion for relief from judgment is granted, and the above-entitled action is reinstated as to the plaintiffs Simeon Tinagen, Ted Oreiro, Arturo Quebral, Millicent Jennings as Administratrix of the Estate of Victoria A. Velasco, and Nakat Packing Company subject to the following conditions:

1. The attorneys for each defendant shall prepare time billings for work done in preparation for this motion and

submit same to the Court and to the attorneys for the plaintiffs. Plaintiffs shall not be allowed to proceed with this action unless the same bills are paid upon approval by the Court.

2. If any of defendants' interrogatories presently of record in this case have not been answered, plaintiffs will have 30 days, i.e., until October 24, 1972, in which to answer said interrogatories.

3. The material requested in defendant General Electric Company's motion to produce filed August 19, 1970, and the material requested in defendant General Electric Company's motion to produce dated December 2, 1970, and in defendant State of Alaska's motion for production dated March 19, 1971, shall be provided to all defendants requesting same within 30 days, i.e., by October 24, 1972. In the event that plaintiffs are unable to provide any of the material requested in the above motions to produce, plaintiffs shall make a showing that said material is unavailable to the plaintiffs and cannot be located and produced through the exercise of due diligence.

4. All other outstanding attorneys' fees due and owing to the attorneys for the defendant General Electric Company shall be paid before further proceedings are held in this action.

Subject to the above conditions,

IT IS ORDERED, ADJUDGED and DECREED that the motion of the plaintiffs to reinstate the above-entitled action as to plaintiffs Simeon Tinagen, Ted Oreiro, Arturo Quebral, Millicent Jennings as the Administratrix of the Estate of Victoria A. Velasco, and Nakat Packing Company is granted.

DONE this 6th day of October, 1972.

/s/ EDWARD V. DAVIS
Edward V. Davis
Superior Court Judge

APPENDIX E

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 69-2870

JOHN D. SCHANDELMEIR, *Plaintiff*,

vs.

WINCHESTER WESTERN, A DIVISION OF OLIN MATHIESON, A CONNECTICUT CORPORATION, *Defendant*

Order Denying Motion to Vacate Order Denying Motion to Set Aside Judgment of Dismissal

DISCUSSION

Proceedings to Date:

Plaintiff filed his complaint on October 20, 1969, alleging in substance that he owned a Winchester Model 70 Rifle, Serial Number 103398, Calibre 300 H & H magnum which exploded on August 11, 1968, while being used by him on a hunt. Plaintiff allegedly suffered personal injuries from the explosion which he alleges could be traced to a defect in the rifle existing at the time of manufacture. Defendant's claims were in tort alleging strict liability and under the U.C.C. alleging breach of implied warranty.

Defendant attempted to remove the case to Federal District Court but it was remanded by the court on December 16, 1969.[1]

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[1] Judge Plummer, by opinion dated November 24, 1969, indicated that plaintiff's complaint demanded an amount "in excess of $3,000" which did not meet the Federal court's jurisdictional amount, i.e. $10,000. Plaintiff no doubt relied upon *Miller* v. *Johnson*, 370 P.2d 171, 172 (Alaska 1962); *Wilson* v. *Interior Airways*, 384 P.2d 956, 958-959 (Alaska 1963) and Civil Rule 54(c) for the proposition that no monetary relief need be plead under Alaska practice.

Defendant answered generally denying the allegations of the complaint and affirmatively alleging that weapons of the class mentioned in the complaint were manufactured just after the Second World War and had thus been in circulation for over 25 years precluding, as a matter of law, the imposition of strict liability or a finding of breach of commercial code warranty.

The parties engaged in discovery during 1970. On October 27, 1970, in response to an interrogatory, plaintiff informed defendant that the only eye witness to the accident was one John C. Schandelmeir, plaintiff's son. Defendant thereafter, on April 7, 1971, noticed the deposition of plaintiff and his son for April 22, 1971. The son was properly subpoenaed on April 13, 1971.

On July 14, 1971, defendant moved to dismiss the complaint. The deposition of plaintiff and his son were continued a number of times. Plaintiff's attorney, by letter dated April 22, 1971, warranted that plaintiff and his son would be present on May 3, 1971. Apparently they were not. The motion to dismiss apparently resulted in an agreement whereby plaintiff's deposition was to be taken September 3, 1971, and apparently it was.

The case was assigned to me on January 25, 1972, and the trial set for May 8, 1972, a day certain.

Further efforts were made to take the son's deposition resulting in his being successfully subpoenaed on February 2, 1972. The deposition was not taken at that time or at several later times at which it was re-scheduled.

Defendant moved to dismiss the complaint on March 3, 1972, alleging in substance that plaintiff had conspired with his son to thwart discovery. The motion was noticed for hearing on Monday, March 20, 1972, at 1:30 p.m. Under Rule 77(e)(2) opposition was due two court days prior

to the hearing, or on Thursday, March 16, 1972.[2] It is the Superior Court's practice to have the court attorneys monitor motion practice. If timely opposition is not filed, the relief requested is treated as having been the subject of a stipulation and the moving party's attorney is requested to submit an appropriate order (Civil Rule 77(f)(2)). The record reflects that a court attorney called Mr. Clark on March 17, 1972, and requested that he submit an order. This court entered its judgment of dismissal on March 29, 1972. On April 17, 1972, (eleven days before the final day to notice an appeal—April 28, 1972), plaintiff filed a motion to vacate the judgment and for relief from judgment pursuant to Civil Rule 60(b)(6). No mention is made in that motion of any alleged mistake of law. The grounds for the motion and the reasons for my ruling denying it are fully set out in my decision dated July 13, 1972, and will not be repeated here.

On August 10, 1972, one day before the time to appeal this court's order denying Rule 60 relief ran out, plaintiff filed its present motion to vacate that order. In substance, plaintiff alleges that this court committed a mistake of law in dismissing the complaint on March 29, 1972.

Defendant counters that this matter in on appeal and consequently this court lacks jurisdiction to consider this motion. I have concluded under the rationale of *Fischback and Moore of Alaska, Inc.* v. *Lynn*, 407 P.2d 174, 176 (Alaska 1965), that my ruling upon this motion would not amount to a conflict with the jurisdiction of the Supreme Court, and that consequently I have jurisdiction. Cf. Supreme Court Rule 9(a)(3).

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[2] In determining when opposition is due, Rule 77(e)(2) requires that one begin with the day of hearing and count back two days. In computing time, Rule 6 indicates that the date from which time is computed is disregarded as well as the final date if it is a court holiday. In any event, when the time allowed is less than 7 days (here two days is specified), all intervening Saturdays and Sundays are disregarded.

I have not been cited to an Alaska decision applying Rule 60(b)(6) to a fact situation similar to the instant case. In the federal courts, the comparable Civil Rule 60(b)(6) applies only to those situations not covered by 60(b)(1-5)[3] and like them, is not a substitute for appeal.[4] Alaska Civil Rule 60(b)(1) refers to:

> "(1) mistake,[5] inadvertence, surprise or excusable neglect;"

Thus, while mistake of law can be raised by Rule 60 motion, it must be raised within the thirty days following the judgment, here dated March 29, 1972, allowed for appeal,[6] e.g. by April 28, 1972. Since the first claim of mistake of law in this case was made on August 10, 1972, it is untimely and must be disregarded. Nevertheless, a few comments are in order.

Implicit in the motion is a misunderstanding of Rule 77 and the part it is intended to play in Superior Court practice. A hearing properly conducted gives the court an opportunity to thoroughly discuss the relevant law and facts with counsel to insure that it fully understands the dispute presented before it rules. In order to carry on such a dialogue, the court must be thoroughly prepared, i.e. must have read the authorities cited and usually carried out substantial research of its own, particularly if one side is poorly presented. If the court waits until after the hearing to prepare, it loses the benefit of this dialogue with

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[3] *Moore's Federal Practice* (2nd Ed.) ¶ 60.27[2] at 352-353 (1971).

[4] *Ibid.*

[5] At one time it was thought that "mistake" applied only to the moving party. Now, the prevailing view allows use of Rule 60(b)(1) to raise mistakes of law by the court, d. ¶ 60.22[3] at page 258.

[6] *Ibid.*, ¶ 60.22[4] at 267-268.

counsel and unreasonably delays its decision. Where, however, the court takes this time to prepare only to discover that the motion is unopposed, i.e. both parties agree that it be granted or that the case has settled, the court's time has been wasted and, more important, other cases in which real disputes exist are deprived of that time and are either decided upon an inadequate record or continued, thereby creating a backlog and delaying justice.

To avoid this problem, the Supreme Court enacted Rule 77(e) and (f) which have no counterpart in the Federal Rules. Under Rule 77, a party against whom a motion has been made has two options, either of which must be done two trial days before the hearing. He may (1) oppose the motion in writing [Rule 77 (e)(2)(a)] or (2) signify that he does not oppose the motion [Rule 77(e)(2)(b)]. If he does neither, he will be treated as having consented that the motion be granted, id. 77(f)(2).[7] It should be noted that this is far more than a waiver of opposition; it is a finding of affirmative consent, i.e. that the relief requested by the motion was the subject of a stipulation. In this way, the court can plan its research to only cover those issues truly disputed.

While it might seem that no one would intentionally fail to oppose a dispositive motion (one for summary judgment or to dismiss), this is not true. Dispositive motions are most often made either in cases in which one party is weak on the facts or the law, or one in which the law is unsettled and the outcome uncertain. These are cases most likely to be settled. Thus, absent Rule 77, a court would frequently thoroughly research the often complex legal problems upon which a dispositive motion was based only to discover at the hearing that the case was settled

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[7] I realize that Rule 77(f)(2) gives the court discretion not to treat the motion unopposed, but the burden should be on the party failing to comply to justify the exercise of that discretion in his favor by, for example, a motion pursuant to Rule 6 for additional time.

in the interim. Enforcement of Rule 77 is the only way to insure that limited judicial time is properly allocated to truly disputed issues.

No injustice is worked by this procedure. If a party has inadequate time to prepare, he may move (either before or after the time runs) for additional time. See Rule 6(b). If judgment is entered due to excusable[8] or even inexcusable[9] neglect, it may be reinstated on an appropriate showing, but the burden to make that showing must be placed on the party violating Rule 77. The reason for this should be clear.

The Supreme Court has many times pointed out the importance of requiring counsel and parties to comply with court rules in order to expeditiously process cases to final judgment on the merits. Civil Rule 1, and see *Ketchikan Cold Storage Co.* v. *State of Alaska,* 491 P.2d 143 (Alaska 1971). Nevertheless, the court has been equally concerned to avoid use of the rules to unfairly deprive a party of his day in court, and thus requires evidence or wilful violation of court rule or order before an action can be dismissed, default entered, a fine imposed, or facts established by a preclusion order. Similarly, a showing that a violation of court rule or order was "without substantial justification" is required in order to impose costs (I assume that this is the same as inexcusable neglect in Rule 60 practice) (*ibid.*).[10]

While fair in theory, this gloss of the rules is difficult of practical application since the complaining party and the

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[8] Civil Rule 60(b)(1).

[9] Civil Rule 60(b)(6); see 7 *Moore's Federal Practice,* ¶ 60.27[2], pp. 365-374.

[10] Some sanction must be imposed or the rules will continue to be ignored. Generally, three types of sanctions have been suggested for rule violations:

(1) Dismissal of the claim where a plaintiff is at fault or the striking of the answer and entry of default where a defendant is

court rarely know why the defaulting party failed to obey the court rule or order. Only the defaulting party knows why he did what he did or failed to do what he did.

Therefore, I have determined to place the initial burden of establishing a violation of court rule or order on the complaining party, but shift the burden of negating wilful violation and establishing substantial justification on the

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at fault. See Civil Rule 37 and 41. These and preclusion orders are the most serious sanction.

(2) A fine levied against the offending party or his attorney. See Rule 90; as 09.50.010(3)(5) and (9). Where the attorney is at fault, a fine is the sanction *Moore* recommends. See 7 *Moore's Federal Practice*, ¶ 60.27[2], text accompanying n.47 at 369; *Mely* v. *Morris*, 409 P.2d 979, 983 (Alaska 1966).

(3) The imposition of costs on the offending party or his attorney. See Civil Rule 95.

The Supreme Court requires a finding of "wilfulness" before a case may be dismissed, (*Oaks* v. *Rojcewicz*, 409 P.2d 839, 840 (Alaska 1966); *Mely* v. *Morris*, 409 P.2d 979, 982 (Alaska 1966)), or a fine imposed, (*Taylor* v. *District Court for the Fourth Judicial District*, 434 P.2d 679 (Alaska 1967)). It is strange that in *Oaks, supra*, and *Mely, supra*, a violation of court rule is free from wilfulness only if the violator was unable to comply for reasons beyond his control, thus, consistent with those decisions, a case could be dismissed where the violator had the ability to comply but negligently failed to do so since neglect (or at least inexcusable neglect) is "fault." In *Taylor, supra*, however, the court put a much more restrictive definition on the word "wilful" where the levy of a nominal fine ($100) against an attorney was involved, for there the attorney clearly had the ability to comply with Rule 40(f)(2) as supplemented by Rule 6(b), i.e. he could have made a motion on short notice for a continuance but failed to do so. While the trial court could have ignored a secretary's oral request for a continuance by phone and compelled the defendant to go to trial if a civil case (see *Gregoire* v. *NBA*, 413 P.2d 27, 33-36 (Alaska 1966)) or issued a bench warrant for the defendant if a criminal case, it nevertheless did what *Moore* suggested and focused attention on the guilty attorney only to be reversed. Thus, *Taylor* stands for the proposition that the court cannot fine an attorney (and by implication, his client) for even in-

defaulting or disobeying party. This, I fee, will vindicate court rules and orders while preserving the rights of both

excusable neglect, thus overruling *Mely* sub silentio on this point and leaving the trial court with no meaningful sanctions to impose for inexcusable neglect.

Assessment of costs or attorney's fees pursuant to Rule 95 is worthless, first, because the victim of rule violation is the court system and the public at large, including the parties in other matters whose cases are unnecessarily delayed, as much as the defaulting party's opponent, and there is no method for calculating cost to the court; second, the actual costs traceable to rule violation are rarely capable of measurement even as regards the opposing party; third, this is a small community, counsel must live and work together, and to do so, they must get along; it is an unwritten rule in general operation in this district that where the court, in attempting to enforce its rules, assessed costs or attorney's fees pursuant to Civil Rule 95, the party in whose favor the court acts shows his generosity by (off the record) forgiving the assessment and relieving the offending attorney or his client of the need to pay. The bar association for good reason or bad will not police its members. Finally, a large percentage of litigants are either judgment proof or have their assets concealed, rendering collection of costs impossible. In any event, the cost of collection would in most cases exceed the costs collected. Predicating a dismissal upon failure to pay costs raises substantial constitutional questions, (see *Mely* v. *Morris, supra*) and the true deadbeat has all the appearance of an indigent.

Finally, dismissal without prejudice or placing a case at the foot of the calendar can be a sanction in some jurisdictions with a year or two backlog of cases ready for trial; here, however, any case in which counsel are prepared can be tried within a short time after filing. If cases are delayed beyond that, it is because one or both counsel wish a delay. Thus, dismissal without prejudice is a benefit rather than a sanction to dilatory or careless parties and counsel since it allows the case to remain in limbo for an entire year (see AS 09.10.240), or to be refiled at any intervening time at the defaulting party's whim. It is in practice merely a continuance.

In summary, since rule violations are most often the result of indifference, carelessness and negligence rather than wilfulness, and the trial calendar is so flexible that dismissal without prejudice is more often a reward than a sanction, neither Rule 90 nor Rule 95 provides a viable answer to rule violation.

parties to fair resolution of their conflicting claim. See *Johanson* v. *State*, 491 P.2d 759, 766-767 (Alaska 1971).

Besides developing the facts necessary to a proper resolution of the issue of rule or order violation, this procedure, by placing the burden and the expense of justifying rule or order violation on the offending attorney or party, will serve to bring home to both the seriousness of the problem and the necessity of substantial compliance with court rules and orders.

Implicit in the foregoing is assurance that all unexcused violations of court rules and orders brought to this court's attention will be sanctioned and that the seriousness of the sanction (whether dismissal, default judgment, assessment of costs, or imposition of fine for contempt of court) will turn on the explanation for the volation. In determining culpability, the court will consider whether the party defaulting made reasonable efforts to seek an extension of time or otherwise alert the opposing party of a probable violation of rule or order so that the latter could minimize resulting cost or damage. Applying this test to the instant case, I find a properly noticed motion to dismiss requesting intelligible relief and allowing 17 days' notice. I find from the supporting papers a strong, though by no means conclusive, inference of plaintiff's violation of the court's discovery rules in connection with the deposition of his son. (The alleged rule violation, i.e. failure to make discovery, is clear; it is the basis for the motion to dismiss, i.e. whether Civil Rule 37(d) or 41(b), that leaves me in some doubt.)[11] This question was mooted in this case by plain-

[11] Plaintiff never questioned the legal basis for this court's ruling until his most recent motion and has probably waived that issue. In any event, error in this court's ruling was proper for appeal, not a Rule 60 motion. See 7 *Moore's Federal Practice*, Rule 60(b)(6) *passim*; see *Moore* op. cit. ¶ 60.30[3] text accompanying n.8 at 431. *Moore* states that a party may not complain of alleged errors of law by the court after the time for appeal has run by means of a Rule 60 motion. See *Moore* op. cit. ¶ 60.22[3] *passim*, esp. text accompanying note 4 at p. 268.

tiff's failure to file timely opposition which, in the absence of an explanation, is the equivalent of stipulating to the relief requested. See Civil Rule 77(f)(2). Regardless, I believe that Mr. Clark did make a sufficient showing to shift the burden to plaintiff to explain, if he could, the difficulties that apparently attended the deposition of his son. In any event, plaintiff clearly violated Supreme Court Rule 77(e)(2), justifying this court in presuming a waiver of any opposition to the motion to dismiss. Civil Rule 77 (f)(2).[12] Once the motion was granted and judgment of dismissal entered, the plaintiff had two options: (1) a timely appeal or (2) a motion for relief from judgment pursuant to Rule 60. Plaintiff chose the latter and, therefore, it was incumbent upon plaintiff in that motion for relief from judgment to show fully "(1) mistake, inadvertence, surprise or excusable neglect;" and completely explain the various rule violations alleged and particularly, his failure to comply with Civil Rule 77(e)(2). This has never been done. Brushing aside plaintiff's rather tenuous argument that filing opposition to a motion to be heard on that Monday can somehow comply with Rule 77(e)(2), we are left with no explanation whatsoever why plaintiff did not file timely opposition two full court days prior to the Monday hearing, i.e. on the preceding Thursday, as is required by Civil Rule 77(e)(2), cf. Civil Rule 6(a). The

[12] I realize that finding consent and treating the relief requested in the motion as the subject of a stipulation is discretionary (see *Channel Flying, Inc.* v. *Bernhardt*, 451 P.2d 570, 572 (Alaska 1969), but the burden is upon the defaulting party to convince the court that it should not find a consent. The Rule 60(b) motion gave plaintiff the opportunity. In order to sustain that burden, plaintiff must establish (1) that he did not, in fact, consent or stipulate to dismissal; (2) that failure to file timely opposition was the result of 'mistake, inadvertence, surprise or excusable neglect;" and (3) that the opposition, if timely filed, was meritorious. Conceding that the first point has been established, no attempt has been made to show the second. Plaintiff has failed to establish excusable neglect.

hearing date is the event from which time must be calculated but Civil Rule 6(a) provides that where the period allowed is less than seven days, intervening Sundays and court holidays are excluded. Here, the two days are for the benefit of the trial court to enable it to adequately prepare for the hearing. Since Saturday is a court holiday, it follows that reading Rule 77(e)(2) and 6(a) together, where a motion is to be heard on Monday, opposition must be filed no later than the preceding Thursday to be considered unless additional time is obtained pursuant to Civil Rule 6(b). (No application pursuant to Civil Rule 6(b) has ever been made by plaintiff nor has an explanation ever been offered explaining why opposition was not timely filed.) This, despite the fact that plaintiff has brought both a motion for relief from judgment and a motion to vacate this court's denial of that motion subsequent to the time this court, in reliance on Rule 77(e) and (f)(2), dismissed the claim. The only legitimate conclusion that I can draw is that there is no explanation and, therefore, no basis for relief under Rule 60(b). Plaintiff's suggestion that the interplay between Rule 77(e)(2) and Rule 6(a) is ambiguous might justify relief if plaintiff contended that either he or his attorney were mislead by the ambiguity. See *Aleutian Homes* v. *Fischer*, 418 P.2d 769,773 (Alaska 1966). No such claim is made.

In reaching this conclusion I have not overlooked the preference previously indicated for resolution on the merits (*Oaks* v. *Rojcewicz*, 409 P.2d 839 (Alaska 1966); see 7 *Moore's* Federal Practice, ¶60.27[2] at 362-363), or the distinction between Rule 60(b)(1) and 60(b)(6).[13]

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[13] See *Moore*, op. cit. ¶ 60.27[2] text accompanying n.23 at 361. Generally, Rule 60(b)(6) is a catchall covering those situations not governed by Rule 60(b)(1-5). Motions to set aside judgments by default or by dismissal are generally covered by Civil Rule 60(b)(1), see *Moore*, op. cit. ¶ 60.27[2] pp. 362-363 but cf. *id.* at 366. Here we do not know the precise basis for the relief claimed and cannot determine whether the motion is truly a (b)(1) or (b)(6) motion.

Finally, I am operating on the assumption that our Supreme Court in *Mely* v. *Morris*, 409 P.2d 979 (Alaska 1966) adopted in large part the rationale of the dissent in *Link* v. *Wabash R.R.*, 370 U.S. 626; 82 S. Ct. 1386; and 8 L. Ed.2d 734 (1962), that the sins of the attorney should not be visited upon his client. See also, *Moore, supra*, pp. 367-371, especially n.47 and accompanying text, pp. 369-371. This issue is not presented in this case since we have no explanation of why opposition was not timely filed, and therefore, are not called upon to determine whether the failure was wilful, or if neglect, whether the neglect was that of plaintiff, plaintiff's counsel or a combination of both.

IT IS THEREFORE ORDERED:

The motion to vacate the order denying the motion to set aside the judgment of dismissal is denied. Defendant is awarded Fifty Dollars ($50.00) attorney's fees for time expended in opposing this motion.

DATED at Anchorage, Alaska, this 31 day of August, 1972.

/s/ JAMES K. SINGLETON, JR.
James K. Singleton, Jr.
Judge of the Superior Court

APPENDIX F

CIVIL RULES

Rule 60. Relief from Judgment or Order.

(b) Mistakes—Inadvertence—Excusable Neglect—Newly Discovered Evidence—Fraud—Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not personally served, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis and audita querela are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

GEORGE A. HAMMOND, *Plaintiff*,

vs.

J. RAY McDERMOTT COMPANY AND
FOSS LAUNCH & TUG COMPANY, *Defendants*

No. A-2-68 Civil

Memorandum to Counsel

The incident out of which this action arose occurred on June 28, 1966. The complaint by which this action was commenced is dated December 29, 1967, and was filed on January 3, 1968. The case has been at issue since March 20, 1968.

The case presently comes before the court on plaintiff's motion to reinstate after the court entered an order of dismissal on September 22, 1971. The order of dismissal was entered on the basis that plaintiff had failed to comply with the court's pre-trial conference order of May 27, 1971, in the following respects:

The order provided for a conference betwen attorneys to be held by counsel for the parties on or before July 2, 1971, at which the following was to be accomplished:

1. Each attorney was to exhibit to the other all documents and things embraced within Rule 34, Federal Rules of Civil Procedure, intended to be offered at trial by each party.

2. Each attorney was to exchange witness lists and state the substance of the testimony of each expert witness expected to be called.

3. Each attorney was to specify to the other his contentions as to the applicable facts and law, and thereafter

discuss the possibilities of admissions or stipulations of fact.

4. Within seven (7) days from the date of the conference between attorneys on July 2, 1971, plaintiff's attorney was to prepare and file a concise statement of each fact admitted in the pleadings and any fact stipulated to at the attorneys' conference.

5. Each party was required to set forth in its pre-trial memorandum a concise statement of each contested issue of fact to be litigated and a concise statement of each contested issue of law to be litigated.

6. A pre-trial memorandum was to be filed by each party at least ten (10) days prior to August 6, 1971, the date scheduled for the pre-trial conference. The notice and order of pre-trial conference explicitly provided that should either counsel or the parties fail to comply timely with the provisions of paragraph 3 thereof, that the court would thereupon enter an order of dismissal, orders of default, or other appropriate orders, without further notice being given.

7. Plaintiff, within ten (10) days after the pre-trial conference to be held on August 6, 1971, was required to submit a pre-trial order reciting the action taken at the pre-trial conference.

The notice and order of pre-trial conference entered on May 27, 1971, specifically provided that any party having a valid reason for being relieved from complying with any provision of the order should, within ten (10) days from the date thereof, set forth such reason or reasons in an ex parte application to be excused therefrom.

The conference between attorneys was held on or about July 2, 1971, and thereafter defendant filed its witness list, pre-trial memorandum, a statement of issues of fact and law to be litigated, and a submission of exhibits to be marked and offered in evidence.

Plaintiff did not file any of the things required by the notice and order of pre-trial conference filed May 27, 1971. Accordingly, the court on August 4, 1971, entered a minute order finding plaintiff in default, and on September 22, 1971, an order of dismissal was entered.

On September 22, 1971, plaintiff filed a motion to reinstate and an affidavit in support thereof which stated that due to the press of other business, plaintiff's attorney inadvertently forgot to fulfill the other pre-trial requirements pursuant to the order of May 27, 1971. On September 22, 1971, plaintiff filed a purported pre-trial memorandum which should have been filed at least ten (10) days prior to August 6, 1971.

Defendants' opposition memorandum to plaintiff's motion to reinstate contends that plaintiff's counsel has not satisfactorily complied with the court's notice and order of pre-trial conference and further asserts that plaintiff's motion and affidavit fail to comply with the requirements of Rule 60(b) of the Federal Rules of Civil Procedure.

The affidavit in support of plaintiff's motion to reinstate filed on September 22, 1971, clearly establishes neglect. However, it sets forth no facts showing that the neglect was excusable or inadvertent. To obtain relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure, a party must make some showing as to why he was justified in failing to avoid mistake or inadvertence. Gross carelessness is not a basis for relief.

The court takes judicial notice of the court's records and files in the following cases insofar as they relate to the mode of conduct and method of operation practiced by plaintiff's counsel for approximately the past two years with reference to failure and refusal to comply with the Federal Rules of Civil Procedure and the rules and order of the court:

Jennings v. Halliburton Equipment Co., No. A-7-71 Civil

Keister v. Houston, No. A-49-67 Civil
Olson v. Firestone Tire & Rubber Co., No. A-63-68 Civil
Braker v. Cook Inlet Tug & Barge, No. A-120-69 Civil
Lochbaum v. McDermott, No. A-5-68 Civil
Farrior v. U.S.A., No. A-40-71 Civil
Newman v. Shell Oil Co., No. A-58-68 Civil
Gillick v. U.S., No. A-58-69 Civil
Asse v. McDermott, No. A-158-68 Civil
Verhoeff v. New England Fish, No. A-60-69 Civil
Chapman v. Kaiser Steel Corp., et al., No. A-146-67 Civil
Neuser v. Shell Oil Co., No. A-148-68 Civil
International Brotherhood of Teamsters v. Frontier Rock & Sand, Inc., No. A-144-68 Civil
Anchorage Sand & Gravel v. Anchorage Lathing & Plastering Co., No. A-134-68 Civil
Meyers v. Ryan Contracting Corp., No. A-151-68 Civil
U.S.A. v. Lessman, No. A-23-69 Civil
Miller v. U.S., No. A-87-69 Civil
Taylor v. McDermott, No. A-97-68 Civil

On the record before the court, plaintiff has failed to show that his present predicament was attributable to anything other than the inexcusable neglect of his counsel in failing and refusing to comply with the Federal Rules of Civil Procedure and the rules and orders of the court.

To unconditionally award plaintiff the relief he presently seeks would reward him for his conduct and lack of diligence, and would make a farce and mockery of the timely compliance and efforts of counsel for defendants.

Accordingly, it is now ORDERED:

1. The order entering plaintiff's default, filed August 4, 1971, is vacated and set aside.

2. The order of dismissal filed September 22, 1971, is vacated and set aside.

3. The case is hereby set for trial by jury at the hour of 10:00 a.m. on Tuesday, May 30, 1972, in Courtroom 1.

4. Exhibits or documents which were not displayed to opposing counsel on or before July 2, 1971, or which were not marked pursuant to Court Rule 9A and filed with the Clerk at least ten (10) days in advance of August 6, 1971, will not be admitted in evidence on the trial of the case.

5. Witnesses, including expert witnesses, whose names do not appear on lists that were exchanged on or before July 2, 1971, will not be permitted to testify on the trial of the case.

6. The issues for trial will be limited to those contested issues of fact and of law that are contained in any pre-trial memorandum which was filed at least ten (10) days in advance of August 6, 1971.

7. The voir dire examinatoin of prospective jurors will be conducted by the court. The court will supplement its examination by asking the prospective jurors such additional questions as it deems proper that are submitted in writing by the parties or their attorneys on or before Wednesday, May 24, 1972.

8. The manner of selection and order of examination of jurors will be in accordance with Rule 15 of the Rules of the United States District Court for the Eastern District of Washingto, a copy of which is attached hereto and by reference incorporated herein.

9. On or before Wednesday, May 24, 1972, counsel for the parties shall file in writing their requests that the court instruct the jury on the law as is set forth in said requests.

Special instructions pertaining to this particular case will not be prepared by the court and counsel are hereby directed to prepare and submit any instructions of this nature which will be requested of the court.

The requested instructions shall be numbered consecutively. They shall indicate which party presents them and shall embrace but one subject. The principle of law embraced in any requested instruction shall not be repeated in subsequent requests. *Each request shall contain a citation of authorties in support of the instruction.* Requests that do not comply with the terms of this order will not be considered by the court.

10. On or before Wednesday, May 24, 1972, each party shall submit to the court in duplicate a brief on all issues of law and evidence other than general routine matters, which the party will assert or urge on the trial of the case. The briefs shall contain a candid, complete, clear and concise statement of reasons in support of each issue of law or evidence together with an adequate citation of authorities.

11. The trial of this case will be conducted in accordance with "Rules Governing Conduct of Trial" which are attached hereto and by reference incorporated herein.

/s/ RAYMOND E. PLUMMLER
United States District Judge

DATED: May 3, 1972

EME COURT, U. S.

73-526

Supreme Court, U. S.
FILED
NOV 5 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. [redacted]

ALASKA HELICOPTERS, INC., *Petitioner*

v.

LESTER M. ANDERSON, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL F. ROBISON
921 West Sixth Avenue
Anchorage, Alaska 99501

Attorney for Respondent,
Lester M. Anderson

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SUBJECT INDEX/TABLE OF CITATIONS

Pursuant to Supreme Court Rule 39(3), a printed document of less than ten pages is not to contain a Subject Index or Table of Citations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-626

ALASKA HELICOPTERS, INC., *Petitioner*

v.

LESTER M. ANDERSON, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Lester M. Anderson, respectfully requests that the Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska be denied.

OPINIONS BELOW

The relevant opinions are all unreported, and are attached as appendices as follows:

APPENDIX A—Supreme Court, Order, dated June 28, 1973, in *Alaska Helicopters, Inc.* v. *Anderson.*

APPENDIX B—Superior Court, Order Granting Reinstatement of Cause, dated August 17, 1972, in

Anderson* v. *Atlantic-Richfield Co. and Alaska Helicopters, Inc.

JURISDICTION

This petition is not within the jurisdiction of the Court because it is not taken in conformity with 28 U.S.C. § 1257(c) (App. C). The petition does not submit a federal question of substance as required by Supreme Court Rule 19(1)(a).

QUESTION PRESENTED

Whether a state court can exercise the discretion to reinstate a case pursuant to Alaska Rules of Civil Procedure 60(b)(6) which has previously been dismissed for reasons of gross misconduct of attorney.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case does not involve any constitutional provision, treaty, statue, ordinance or regulation.

Alaska Civil Rule 60(b)(6) (App. D) is the authority under which the Alaskan Courts reinstated the case.

STATEMENT OF THE CASE

On or about July 17, 1969, Lester M. Anderson was employed by Frontier Rock and Sand, and was engaged in construction work at an oil rig site on the North Slope owned by Atlantic-Richfield Company. On that date, Anderson was struck by the rear propeller of a Fairchild-Hiller helicopter owned and operated by Alaska Helicopters, Inc.

On October 9, 1969, an action entitled *Lester M. Anderson* v. *Atlantic-Richfield Company and Alaska*

Helicopters, Inc. was filed in the Third Judicial District, State of Alaska. Subsequently, the claim against Atlantic-Richfield Company was dismissed, with prejudice, by stipulation of the parties.

Respondent's suit against Alaska Helicopters, Inc. was dismissed, without prejudice, on July 12, 1971, for failure of the Respondent to answer interrogatories. Respondent Anderson submitted to the trial court his affidavit that he had returned to his then attorney, Thomas Curran, all interrogatories submitted to Respondent to answer. After the order of July 12, 1971, Respondent's attorney, Thomas Curran, moved twice to reinstate the action, but never informed Respondent that the case had been dismissed. Respondent was never informed by Thomas Curran even when discussing his case, that it had been dismissed. Respondent first learned his case had been dismissed in July, 1972, when he contacted new counsel. On July 11, 1972, Respondent, through new counsel, Hagans, Smith & Brown, filed his motion to reinstate his case, supported by affidavits and memoranda. Answers to all interrogatories were filed. On August 17, 1972, the Honorable C. J. Occhipinti reinstated the action pursuant to Alaska Rule of Civil Procedure 60(b)(6) (App. D). This reinstatement occurred less than a year after the case had been dismissed without prejudice for failure to answer interrogatories.

The Alaska Supreme Court discretionarily granted review of the trial judge's order granting reinstatement. After full briefing and oral argument, the Alaska Supreme Court denied the Petition for Review, thus upholding the exercise of discretion by the trial judge in reinstating the case.

REASONS FOR DENYING THE WRIT

I. This Petition Is Not Within the Jurisdiction of the Court Because It Does Not Raise a Federal Question.

This case is purely a matter of state court procedure in processing civil matters. The orders of the Alaska Supreme Court endorse the action of a trial level judge in reinstating a case previously dismissed without prejudice for failure to answer interrogatories. The authority for the Court's action is Alaska Rule of Civil Procedure 60(b). No federal law is involved in this matter.

Jurisdiction of the Supreme Court of the United States over final judgments rendered by the highest court of a state is defined by 28 U.S.C. § 1257(3) (App. C), and Supreme Court Rule 19(1)(a). In the matter before the Court, no question was raised as to the validity of a treaty or statute of the United States; no question was raised as to the validity of an Alaskan statute on the grounds of its being repugnant to the Constitution, treaties or laws of the United States; and, finally, no title, no right, no privilege nor immunity was specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States. In short, this case does not merit consideration by the Supreme Court of the United States because it does not meet the requirements of 28 U.S.C. § 1257(3), and Supreme Court Rule 19(1)(a), for review by writ of certiorari.

II. Interference with State Court Administrative Policy Is Unwarranted.

The petition complains of the act of the trial judge in reopening the case after interrogatories had been answered. The discretion to reopen the case is vested

in the trial court judge by Alaska Rule of Civil Procedure 60(b)(6) (App. D). The petitioner does not complain that the Alaska Rule is unconstitutional, but rather that the judge improperly exercised the discretion vested in his office by Rule 60. A determination of abuse of discretion by the trial judge in the application of a State procedural rule is not a proper subject for review by the Supreme Court of the United States of America. Second-guessing a trial judge in a discretionary matter is historically not a duty of this Supreme Court.

The trial judge had proper authority for his order to reinstate the case under Rule 60(b)(6), and proper case precedent for his act in *Citizens Bldg. & Loan Assn. of Montgomery Co.* v. *Shepard,* 289 A.2d 620 (D. C. Cir. 1972). The District of Columbia Court of Appeals held that gross and inexcusable conduct of attorneys is not imputed to their clients. This case is nearly on "all fours" with the case at bar. In *Citizens Bldg.,* Id., a default judgment was vacated five (5) years and nine months after it was entered. The original attorney for the defendant had ignored court orders to file an answer and the defendant's attorney had erroneously informed her that the suit was "progressing normally" after it had been dismissed. In the case at bar, the Respondent's original attorney ignored a court order to answer interrogatories, and he never informed the Respondent that the case had been dismissed. These acts, coupled with additional indiscretions on the part of the Respondent's original attorney, persuaded the Court to adopt the rationale of *Citizens, supra,* and the Court reinstated the Respondent's case. This exercise of discretion by the trial judge, which was fully supported by proper authority,

does not present a substantial federal question that merits review by the Supreme Court of the United States.

III. Petitioners Have Not Suffered Extreme, Inherent and Actual Prejudice.

The issue of prejudice was examined by the trial judge, and was briefed and addressed in oral argument before the Alaska Supreme Court. In both instances, the prejudice was considered to be negligible.

IV. Reinstating the Case Was Within the Permissible Range of the Court's Discretion.

The petitioner cites *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386, reh. den. 371 U.S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115 (1962), for the basic proposition that a party is deemed bound by the acts of his attorney. As is true of most "basic propositions", exceptions to the rule are recognized. These exceptions are defined in Rule 60(b) (App. D.) In situations where the acts of an attorney are gross and inexcusable, a citizen should not be bound, nor denied his day in court. *Citizens, supra.*

Link v. *Wabash Railroad Co., supra,* establishes the standard to be applied by the Supreme Court should it undertake to scrutinize the trial judge's act of discretion. As was recognized at Footnote 8, the test is:

> ". . . whether it was within the permissible range of the court's discretion."

Rule 60(b)(6) and *Citizens, supra,* clearly indicate that the act of ordering reinstatement of the case once the interrogatories had been answered was within the permissible range of the Court's discretion.

CONCLUSION

The petition does not present a federal question, nor does it present a federal question of substance that merits review by the Supreme Court. The trial judge had the authority to reinstate the case, and the Court acted within the permissible range of its discretion in so doing. At present, all interrogatories have been answered, and there has been compliance with all Court orders. The matter is proceeding to trial on the merits. Intervention by the Supreme Court at the present juncture is unwarranted.

Accordingly the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent,
Lester M. Anderson

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 1805

ALASKA HELICOPTERS, INC., *Petitioner,*

v.

LESTER M. ANDERSON, *Respondent.*

Order

It is ORDERED:

1. The Petition for Review is denied.

2. The superior court may consider this case further to determine whether, pursuant to Rule 95, Rules of Civil Procedure, costs and attorney's fees should be imposed upon the counsel who acted for respondent in the superior court.

3. The superior court may also consider whether the conduct of counsel for the respondent in the superior court was such as to warrant referral of the matter to the Alaska Bar Association for appropriate investigation and disciplinary action.

BY DIRECTION OF THE COURT.

DATED this 28th day of June, 1973.

/s/ JOSEPHINE M. MCPHETRES
Josephine M. McPhetres
Clerk

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 70-2395

LESTER M. ANDERSON, *Plaintiff*,

vs.

ATLANTIC RICHFIELD COMPANY,
AND ALASKA HELICOPTERS, INC., *Defendants*.

Order Granting Reinstatement of Cause

The history of this case has been heard at previous hearings, but for the sake of brevity the matter here was dismissed on July 12, 1971.

On September 10, 1971, the plaintiff moved to reinstate, which the Court denied. A rehearing was moved and heard on October 15, 1971, at which time the Court advised the plaintiff reinstatement would not be considered unless certain answers to interrogatories were first filed. Some time in November, 1971, certain answers were filed, but no further action was noted until July 11, 1972 when plaintiff again moved for reinstatement, this time being represented by Floyd Smith.

A hearing was scheduled and heard on August 8, 1972. Mr. Curran, who had previously represented the plaintiff, advised he would be out of town that date and requested a continuance. Since the matter had been previously scheduled at least once, and continued, the Court denied the continuance, allowed argument, but gave Mr. Curran until August 11, 1972 at noon to file or submit anything he wished considered. Nothing was filed or submitted.

After a thorough review of the file, it appears that plaintiff may not have been advised of all that transpired in

the case, or counseled on all that was necessary. To deny his motion would be manifest injustice.

Defendant, however, is entitled to reasonable compensation for the delay caused by Mr. Curran is not conforming to orders issued by this Court. Accordingly, defendant's attorney is advised to set a hearing with reasonable notice to Mr. Curran so that the Court may determine how much of the amount posted in the form of a bond shall be awarded to defendant for costs and attorney's fees caused by the delay involved.

DATED at Anchorage, Alaska this 17th day of August, 1972.

/s/ C. J. OCCHIPINTI
C. J. Occhipinti
Superior Court Judge

APPENDIX C

United States Code

§ 1257. STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX D

Alaska Rules of Civil Procedure

RULE 60. RELIEF FROM JUDGMENT OR ORDER.

(b) Mistakes—Inadvertence—Excusable Neglect—Newly Discovered Evidence—Fraud—Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not personally served, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis and audita querela are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-626

ALASKA HELICOPTERS, INC., *Petitioner,*

v.

LESTER M. ANDERSON, *Respondent.*

GENERAL ELECTRIC COMPANY, *Petitioner,*

v.

STATE OF ALASKA, MILLICENT JENNINGS as Administratrix of the Estates of STEVE GANUELAS AND VICTORIA A. VELASCO, TED OREIRO, ARTURO QUEBRAL, SIMEON TINAGEN and NAKAT PACKING COMPANY, *Respondents.*

REPLY TO RESPONDENT ANDERSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION

This reply is necessary to correct an erroneous characterization of Petitioner's position. A judge has wide discretion to impose sanctions, or reopen a case under

Federal or Alaska Rule of Civil Procedure 60(b), but this discretion is not unlimited. Petitioners do not contend that the court abused its existing discretion by reopening these cases. Rather, Petitioners contend that the court does not have the discretion to reopen cases solely because of attorney misconduct, and that the *Link* case specifically sets this limit as a matter of due process of law.

Respondent has cited *Citizen's Bldg. and Loan Assn. of Montgomery Co.* v. *Shepard,* 289 A.2d 620 (D.C. Cir. 1972), in support of his position. It appears from the opinion that this case may have been decided without reference to *Link.* More importantly, however, this case, and others in the subject area of attorneys who fail their clients, do provide excellent examples of the maxim, "Hard cases make bad law." *Citizen's Bldg. and Loan* had its dissenter, Chief Judge Hood, in a 2-1 decision, and dissents in other cases in this subject area are also common. This further disagreement supports the contention that this petition for a writ of certiorari should be granted.

Respondent is incorrect in stating that the courts examined the issue of prejudice to Petitioners and found it to be negligible. Respondents so contended in opposition to Petitioners' contention that the loss of certain witnesses, physical evidence, and an indemnity cause of action were substantial. But as all the orders and decisions show, the focus of the courts' consideration was upon plaintiffs' loss of their causes of action, and the actual prejudice to Petitioners was never discussed or ruled upon. This is actually irrelevant, however, for the prejudice to a diligent litigant in this situation is inherent.

A major goal of most lawyers and judges is the maintenance of high standards in the administration of justice. Occasionally, however, attorneys fail their clients. The results of this failure should properly be placed upon the client who freely selected his defaulting attorney, and not upon the diligent litigant as was done to Petitioners by the Alaska courts. This is even more true today than when *Link* was decided. The client of the defaulting attorney is more adequately protected because legal malpractice actions are more readily available and lawyers' professional liability insurance almost universal. The diligent adverse parties have only the remedies of judicial sanctions leading to default or dismissal, and their cases evaporate as time goes by without work on the case in reliance on an order of dismissal finally entered because of the opposing parties' failure to cooperate in the prosecution of the case. If the cases are then reopened, the diligent parties have substantially weaker cases—an actual reward to the defaulting parties. As this happens time after time, the diligent litigant and attorney lose their respect for the courts and the rules; the lazy, incompetent, or disorganized attorney need not improve; and the administration of justice suffers tragically.

CONCLUSION

Petitioner contends that the *Link* case sets standards of "due process"; Respondent denies this. Petitioner further contends that a judgment of dismissal entered because of attorney misconduct cannot be set aside because of that misconduct—and especially by the same attorney as was done in *General Electric Company*. All information necessary to decision is now before this Court. If this Court disagrees with

Petitioner, or discretionarily elects not to hear this case, the petition should of course be denied. If, however, this Court agrees that the *Link* case sets a standard for our system of representative litigation applicable to state and federal courts, and that this standard has been violated by the reopening of these cases solely because of attorney misconduct, then certiorari should be granted and the possibility of a summary reversal in both cases considered to conserve judicial resources.

Respectfully submitted,

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